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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 346

FANORIOS PANTELOGLOU,

v.

CIA. DE NAV. SAN GEORGE, S.A.

DIAMANTIS DRAKOPOULOS, ET AL.,

v.

CIA. DE NAV. SAN GEORGE, S.A.

SPIRIDON BARDIS,

v.

CIA. DE NAV. SAN GEORGE, S.A.

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND APPENDIX

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August 16, 1962.

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SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY, *Petitioners.*

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PETITION AND APPENDIX

Santa Maria Shipowning & Trading Company, S.A., a Panamanian corporation, Cia. de Navegacion San Martine, S.A., a Panamanian corporation, and Panathena Trading & Shipowning Company, a Liberian corporation, pray that a writ of certiorari issue to review the judgments and orders of the United States Court of Appeals

for the Second Circuit, entered in the above cases on June 6, 1962. A petition for rehearing was denied by the Court of Appeals by order dated June 28, 1962.

OPINIONS BELOW AND JURISDICTION

The opinion of the United States District Court for the Southern District of New York has not yet been reported and appears at page 7a of the Record herein. The opinion of the United States Court of Appeals for the Second Circuit dated June 6, 1962 has not yet been reported and is reproduced at page 1a of the Appendix hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement

This petition relates to three libels instituted in December, 1955 and October, 1956 by former members of the Crew of the S/S "Santa Despo", a Panamanian Flag Vessel owned by Cia. de Nav. San George, S.A. (hereinafter referred to as San George) until its sale in 1955. All three libels were predicated upon claims for allegedly unpaid wages, vacation pay, overtime, indemnities and discharge pay and, in each instance, additional claims were asserted for double-wages pursuant to Sections 596 and 597 of Title 46, U.S.C.

Default decrees were entered against San George in the U. S. District Court for the Southern District of New York on April 30, 1959 and June 17, 1959. A subsequent motion by San George for orders setting aside the defaults and judgments and permitting it to make answer to the libels was denied by the District Court on August 2, 1960, and appeals were taken therefrom to the Court of Appeals for the Second Circuit.

During the period intervening between the entry of the judgments against San George and the denial of the motions to set aside the defaults, the libellants in a companion case, *Koufopantelis v. Cia. de Nav. San Gebrae, S.A.*, 194 F. Supp. 956 (S.D. N.Y. 1960), affirmed, 291 F. 2d 709 (2 Cir.), cert. denied, *Cia. de Nav. San George, S.A., et al. v. Koufopantelis et al.*, 368 U. S. 895 (1961), commenced a supplementary proceeding against petitioners, Santa Maria Shipowning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A., Panathena Trading & Shipowning Company and two other corporations which are not parties to this petition. Said proceedings, instituted under Article 45 of the New York Civil Practice Act in accordance with Rule 69(a) of the Federal Rules of Civil Procedure (Appendix p. 21a), were based upon the theory that funds belonging to San George had been distributed among said third-party shipping companies by their New York financial manager at the direction of an agent of San George.

After extensive examination of the third parties in that proceeding, conducted during the period from June to December 1959, libellants Koufopantelis, et al. moved the District Court for an order directing the third parties to pay the amount of the judgment previously obtained against San George therein. On March 11, 1960, the District Court summarily granted the motion and on March 21, 1960, an order was entered by Palmieri, J. directing the third parties to pay the amount of the *Koufopantelis* judgment. The appeal taken by the third parties from said order was consolidated for purposes of argument with the appeals from the orders of August 2, 1960 which had denied the motions to set aside the San George defaults.

On May 26, 1961, decisions adverse to San George and the third parties were entered by the Court of Appeals for the Second Circuit with respect to both appeals. A petition for a writ of certiorari was subsequently submitted to this Court but was denied. *Cia. de Nav. San George, S.A., et al.* v. *Koufopantelis et al.*, 368 U. S. 895 (1961).

The supplementary proceedings in the *Koufopantelis* matter were instituted in 1959 against each of the petitioners herein, as third parties, by the service of subpoenas in accordance with the Civil Practice Act of the State of New York. The effect of the subpoenas was to enjoin the transfer by the third parties of any property or money belonging to San George, the judgment debtor, which might be in their possession at the time of service. *New York Civil Practice Act* §781 (Appendix p. 16a). It is important to note that, while this restraint upon the transfer of property belonging to San George was imposed upon all of the Petitioners herein, the subpoenas related only to the *Koufopantelis* proceeding and in no way affected their position vis-a-vis the libellants in the present cases.

This injunctive device did not continue in effect indefinitely. On April 1, 1960, in connection with the appeal of the *Koufopantelis* matter to the Court of Appeals, supersedeas bonds were filed by the Petitioners as third parties therein. The effect of these bonds was to vacate the restraints imposed by Civil Practice Act §781 and leave the third parties free to utilize all moneys or other property in their possession as they might see fit. *New York Civil Practice Act* §800 (Appendix p. 21a).

On September 26, 1960, nearly six months after the filing of the supersedeas bonds had released the Petitioners from the injunctive effects of the statute in the

Koufopantelis matter, a stipulation was entered into by the Judgment Creditors (Respondents) herein and the Petitioners whereby it was agreed that on said date Petitioners had been served with subpoenas for the examination of third parties in each of the instant cases.

No examination of the Petitioners as third parties was ever conducted in the present cases. Rather, on November 17, 1960, the Judgment Creditors moved the District Court for an order pursuant to Rule 69 of the Federal Rules of Civil Procedure (Appendix p. 21a) and Section 794 of the New York Civil Practice Act (Appendix p. 18a) directing the Petitioners to pay to the Judgment Creditors the amounts of the respective judgments theretofore entered against San George in the District Court. The basis of the motion was and, in fact, could only have been the examination of the Petitioners as third parties in the *Koufopantelis* case approximately one year earlier. By order dated June 13, 1961 (Record p. 1a) the District Court, McMahon, J., directed the Petitioners to pay the amount of the San George judgments. The appeal subsequently taken from said order was decided adversely to Petitioners on June 6, 1962 (Appendix p. 1a), and a petition for rehearing was denied by the Court of Appeals on June 28, 1962 (Appendix p. 14a).

Question Presented

The question presented is whether the action of the District Court in its application of Section 794 of the Civil Practice Act of the State of New York constituted a deprivation of Petitioners' property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States, U.S.C.A. Const. Amend. V.

Statutes and Rules Involved

The provisions of the Civil Practice Act of the State of New York, §§781, 794, 795, 800 and Rule 69(a) of the Federal Rules of Civil Procedure are set forth in the Appendix hereto.

Reasons for Granting the Writ

The writ should be granted because the scope of authority vested in the courts by Section 794 of the New York Civil Practice Act is of vital concern to all persons who may be subject to process as third parties in proceedings supplementary to judgment in that State. As interpreted by the courts herein, the statute would invest the judicial body with power to impose liabilities virtually at will, with no requirement that such determination be founded upon evidentiary facts.

1. Denial of due process in contravention of the Fifth Amendment to the Constitution of the United States.

By virtue of subdivision (a) of Rule 69 of the Federal Rules of Civil Procedure (Appendix, p. 21a), the supplementary proceedings herein were conducted by the District Court in accordance with Article 45 of the New York Civil Practice Act. Paragraph 2 of Section 794 of the New York statute provides for the issuance of an order, upon motion, directing a third party in supplementary proceedings to pay the judgment creditor "If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor * * * unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial of the issues in an action brought by the judgment creditor * * *".

The companion case of *Koufopantelis* v. *Cia. de Nav. San George, S.A.*, 194 F. Supp. 956 (S.D. N.Y. 1960),

affirmed, 291 F. 2d 709 (2 Cir.), cert. denied, *Cia. de Nav. San George, S.A.* v. *Koufopantelis et al.*, 368 U. S. 895 (1961), decided that, at the time of the service of the subpoenas in supplementary proceedings therein in 1959, the Petitioners were indebted to San George, the judgment debtor. The continuance of this indebtedness until April 1, 1960 cannot be contested in view of the injunctive effect of the third-party subpoenas. *New York Civil Practice Act* §800 (Appendix p. 21a). On the latter date, however, all restraints upon property and accounts under the control of the Petitioners were vacated by the filing of the supersedeas bonds in the *Koufopantelis* appeal. It was not until September 26, 1960, the date of the stipulated service of the third-party subpoenas herein, that Petitioners were again subject to any restraints with respect to property belonging to the judgment debtor which might be in their possession.

Thus, the District Court was confronted, in the initial instance, with the factual question of whether or not Petitioners were, in fact, indebted to the judgment debtor on September 26, 1960. This issue was resolved in the affirmative, with the result that Petitioners were ordered to pay the amount of the San George judgments. What, then, were the grounds for this decision; the evidence presented which made it "appear to the satisfaction of the court" that this indebtedness did exist on the critical date in September 1960? It is submitted that the sole basis for the determination herein consisted of testimony, affidavits and business records elicited in the fall of 1959 in the *Koufopantelis* proceeding. The fact that for a period of nearly six months, from April 1 to September 26, 1960, Petitioners were relieved of all restraints with respect to any moneys of the judgment debtor which might have been under their control was given only the most perfunctory consideration by the court.

It is undeniable, however, that during this intervening period Petitioners were completely free to conduct their business as they might see fit, utilizing all of their resources in such manner as the exigencies of business might dictate. It is patently unreasonable to assume, as did the District Court, that the status quo would be preserved for such a period of time, particularly among a group of companies engaged in an enterprise subject to the economic fluctuations encountered in the shipping industry.

Both the District Court and the Court of Appeals apparently indulged in a presumption to the effect that a state of facts shown to exist in the fall of 1959 must necessarily also have existed on September 26, 1960 in the absence of proof to the contrary. Such an evidentiary device has been recognized by the courts and may have merit when the circumstances of the case indicate a static factual pattern. The rule is stated in *Richardson, Law of Evidence*, §73 (8th ed. 1955) as follows: "Proof of the existence of a person, an object, a condition, or a tendency at a given time raises a presumption that it continued *for as long as is usual with things of that nature.*" (Emphasis supplied.) The decisions dealing with this so-called presumption of continuance frequently qualify their remarks with some assertion to the effect that the presumption only continues "until a different presumption arises from the nature of the subject matter." *N.L.R.B.* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 554 (6 Cir. 1940). If any industry is unsuitable for the application of this presumption it is ship-owning and trading, which, by its very nature is subject to constant vicissitudes and changes of fortune.

The presumption relied upon is not one to be used freely and without regard to other factors. Indeed, such

presumptions "are not to be resorted to until the avenues of direct evidence bearing on the case are exhausted and then only in the absence of sufficient evidence to establish the fact proved." *Application of Carr*, 134 N.Y.S. 2d 513, 518 (Surr. Ct., Chaut. Cnty. 1953), affirmed, 284 App. Div. 930, 134 N.Y.S. 2d 280, reargument denied 285 App. Div. 999, 139 N.Y.S. 2d 275 (4th Dept. 1955). In the cases at bar, direct evidence with respect to the financial position of the Third Parties as of the decisive date, September 26, 1960, was available and its production should have been required by the court.

The New York statute is explicit in its requirement that the existence of an indebtedness must "appear to the satisfaction of the court" before an order may be entered directing payment by the third parties. Implicit in this concept is the necessity for a presentation by the moving party of some salient evidence of the alleged indebtedness. In the instant cases, however, it is correct to say that the District Court reached its decision without resort to the pertinent facts. Its determination of indebtedness rested solely upon evidence which had grown stale with the passage of time and which, in no event, could serve to define the relationships of the parties subsequent to April 1, 1960.

It should further be noted that the District Court was not confronted by a situation which called for the stark alternatives of either a grant of relief to the judgment creditors or an absolute denial thereof. Rather, the court was presented with the additional courses of action of either directing that examinations be held to ascertain the true state of affairs or remitting the judgment creditors to their remedy of instituting a plenary

action against the third parties under §795 of the New York Civil Practice Act (Appendix p. 20a). Indeed, in view of the existence of this issue of fact, the court could not properly enter orders directing payment by the third parties. *Kerekafric (Pty.) Ltd.* v. *Maxwell Meyers Affiliations, Ltd., et al.*, 108 F. Supp. 594, 595 (S.D. N.Y. 1952).

In adopting the course of action followed in the instant cases, the District Court acted in a wholly arbitrary and unreasonable manner. Granting that Section 794 of the New York Civil Practice Act permits the court to use its discretion in determining whether or not a state of facts exists, it cannot be said that this discretion extends to the entry of third-party orders without any consideration of the factual situation or the introduction of some pertinent evidence of the true status of the parties. Although supplementary proceedings are designed to expedite the collection of judgments a limit must nevertheless exist with respect to the extent to which their summary nature will be permitted to override the demands of justice. While justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed. *Smith* v. *United States*, 360 U. S. 1 (1959).

There can be no question but that the District Court herein was limited in the exercise of its discretion by the provisions of the due process clause of the Fifth Amendment to the Constitution of the United States, U.S.C.A. Const. Amend. V. As stated in *Hovey* v. *Elliott*, 167 U. S. 409, 418 (1897), "* * * the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, * * *". It is submitted that the District Court disregarded the limitations thus imposed upon

its authority when it entered the third party orders herein. The lack of pertinent evidence before the Court at the very least established the existence of an issue of fact between the parties which, as is settled under New York Law, precluded the entry of orders directing payment by the Petitioners. *Pouley* v. *Dorland Building Co.*, 281 N. Y. 423, 24 N. E. 2d 109 (1939); *Berkson* v. *Schneiderman*, 7 Misc. 2d 214, 160 N. Y. S. 2d 78 (Sup. Ct. 1957).

CONCLUSION

Because of the need for an interpretation of the scope of authority vested in the courts by Section 794 of the Civil Practice Act of the State of New York and a consideration of the proper exercise of this authority by the Federal Courts, within the compass of the due process clause of the Fifth Amendment of the Constitution of the United States of America, Petitioners respectfully pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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August 16, 1962

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 135, 136, 137—September Term, 1961.
(Argued December 8, 1961 Decided June 6, 1962.)
Docket Nos. 27091, 27092, 27093

PANORIOS PANTELOGLOU,
Judgment Creditor,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

DIAMANTIS DRAKOPOULOS, *et al.*,
Judgment Creditors,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

SPIRIDON BARDIS,
Judgment Creditor,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., PANATHENA TRADING & SHIPOWNING COMPANY and CARGO & TANKSHIP MANAGEMENT CORPORATION,
Third Party Appellants.

Before—WATERMAN, SMITH and MARSHALL,
Circuit Judges.

Appeal by Santa Maria Shipowning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A., Pan-

athena Trading & Shipowning Company and Cargo & Tankship Management Corporation, from an order in the United States District Court for the Southern District of New York, McMahon, J., requiring the appellants, jointly and severally, to pay certain judgments obtained by appellees Panteloglou, Drakopoulos and Bardis. Affirmed as to all appellants except Cargo & Tankship Management Corporation, and reversed as to it.

ISAAC SALEM (Herbert Lebovici, of counsel), New York City, for Judgment Creditors-Appellees.

CHADBOURNE, O'NEILL & THOMPSON (John B. Whalen, of counsel), New York City, for Third Party Appellants Santa Maria Shipowning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A., and Panathena Trading & Shipowning Company.

ALFANGE & FRIEDMAN (Philip A. Friedman, of counsel), New York City, for Third Party Appellant Cargo & Tankship Management Corporation.

WATERMAN, Circuit Judge:

This is an appeal from an order entered in a supplementary proceeding in the United States District Court for the Southern District of New York, pursuant to Fed. R. Civ. P. 69 and N. Y. Civ. Prac. Act §794, by which the third parties Santa Maria Shipowning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A., Panathena Trading & Shipowning Company, and Cargo & Tankship Management Corporation were ordered to pay the judgment creditors Panorios Panteloglou, Diamantis Drakopoulos *et al.*, and Spiridon Bardis, the money judgments

which these creditors had individually obtained against Cia. de Nav. San George, S.A.

The parties involved in this action are the following: All of the libelants are alien seamen who were formerly of the crew of the SS/ "Santa Despo," which was owned by the judgment debtor when the libelants were members of the crew. The judgment debtor, now dissolved, was a Panamanian corporation that formerly owned two ships, the S/S "Santa Despo" and the S/S "Santa Despoina." Three of the four third parties, namely, Santa Maria Shipowning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A. and Panathena Trading & Shipowning Company, are also foreign shipowning corporations. They and the judgment debtor were collectively know as the "Santa Group." All four of these corporations have shareholders in common. The final third party appellant, Cargo & Tankship Management Corporation, acts as ships' agent for all of the "Santa Group." Its predecessor in this capacity was a corporation know as Mar-Trade Corp.

These two ships' agents made disbursements and collected charter hires and other income for the group. Although the ships' agents maintained a single account for the entire "Santa Group" they also kept separate records for each of the four ship-owning corporations and rendered separate monthly statements to each.

In April and June 1959 the present libelants and other alien seamen from the S/S "Santa Despo" obtained default judgments against Cia. de Nav. San George, S.A. on wage claims, and at least one seaman, appellee Bardis, also on a personal injury claim. The defendant's subsequent motions to open the default judgments were denied. *Koutopantelis v. Cia. de Nav. San George, S.A.*, 194 F. Supp. 956 (S. D. N. Y. 1960), *affirmed*, 291 F. 2d 709 (2 Cir.), *cert. denied*, 368 U. S. 895 (1961).

On July 20, 1959, several of the seamen, now having become judgment creditors, brought a supplementary proceeding in the federal district court under N. Y. Civ. Prac. Act §794[1] and Admiralty Rule 20[2] to recover the amounts of their respective judgments against the other members of the "Santa Group" and against Cargo & Tankship Management Corporation. Examination in that proceeding of the account which the "Santa Group" had with Cargo & Tankship Management Corp. revealed the following state of affairs. On January 1, 1959, the judgment debtor, Cia. de Nav. San George, S.A., had a credit with Cargo & Tankship of over $1,000,000. On January 4, 1959, the judgment debtor sold its one remaining ship, the "Santa Despoina" for $860,000 over and above the mortgage on the vessel (the "Santa Despo" had been sold in 1955), and $805,000 of this amount was added to the judgment debtor's account with Cargo & Tankship on or before January 26, 1959. Although three judgments aggregating $51,822.71 were entered against the debtor in favor of the appellees between January 26 and July 23, 1959, on the latter date a

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1. Section 794 states in pertinent part:

> 2. At any time after the commencement of a special proceeding authorized by this article, the judgment creditor may * * * apply to the court for an order directing the said third party to pay to the judgment creditor * * * a sum on account of the alleged indebtedness not exceeding the judgment with interest. If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial of the issues in an action brought by the judgment creditor or a receiver of the judgment debtor or any claimant to said indebtedness.

2. Admiralty Rule 20 states in pertinent part:

> [A]ny * * * remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees.

credit of more than $1,800,000 still existed in the defendant's account on the books of Cargo & Tankship. On the next day, July 24, this credit disappeared. A large part of it, $1,131,000, was transferred by a book entry from the judgment debtor's account to the accounts of the other members of the "Santa Group." After July 31, 1959, Cargo & Tankship's books showed a debit of over $12,000 in the defendant's account. On the basis of this examination of the ships' agent's books the district court ordered the four third parties to pay the judgments obtained against Cia. de Nav. San George, S.A. by the seamen who had brought that supplementary proceeding. This court in *Koufopantelis* v. *Cia. de Nav. San George, S.A.*, 291 F. 2d 709 (2 Cir.), *cert. denied*, 368 U. S. 895 (1961), affirmed that order as to the ship-owning third parties but reversed it as to Cargo & Tankship on the grounds stated in that opinion at 712.

While the *Koufopantelis* appeal was pending, other of the seamen who had recovered judgments against Cia. de Nav. San George, S.A. brought the present supplementary proceeding against the same third parties that were involved in the *Koufopantelis* case. On the basis of the examination in the *Koufopantelis* proceeding, the present judgment creditors made a motion under N. Y. Civ. Prac. Act §794 for an order directing the third parties to pay these seamen's respective judgments against Cia. de Nav. San George, S.A. The motion was granted against all of the third parties. After this court rendered its opinion in *Koufopantelis*, revising the order in that case as to Cargo & Tankship, the ships' agent moved for rehearing of the judgment creditors' motion in the present case; but rehearing was denied.

The ship-owning third parties contend that the court below erred in ordering them to pay the plaintiffs' judg-

ments without a new examination in the present proceeding to determine whether they were indebted to the defendant. But section 794 does not require that any examination of the third parties be made before the judge orders payment. The section only requires that the judgment creditors commence a supplementary proceeding and satisfy the court that the third party is indebted in an ascertainable amount to the defendant. It was entirely proper for the court to rely on the examination in the earlier proceeding, since the parties examined were the same as in this proceeding, and the debt there at issue was the same as here.

Next, the ship-owners claim that a genuine factual dispute exists on the question whether they are indebted to the defendant. If a question of fact does indeed exist, the court may not make an order under section 794; instead the judgment creditor must institute a plenary action under N. Y. Civ. Prac. Act §795. *Kenny* v. *South Shore Natural Gas & Fuel Co.*, 201 N. Y. 89, 94 N. E. 606 (1911); *Powley* v. *Dorland Bldg. Co.*, 281 N. Y. 423, 427, 24 N. E. 2d 109 (1939); (dictum) *Kerckafric (Pty.) Ltd.* v. *Maxwell Meyers Affiliations, Ltd.*, 108 F. Supp. 594, 595 (1952). But we concluded in *Koufopantelis* that there was no genuine dispute as to the indebtedness of the ship-owning third parties. Even if that decision is not controlling in this case, it is at least highly persuasive as to the result we should reach here. Seeking to avoid the result in that case, the third parties now assert that any debt which they might have owed to the defendant at the time of the examination in *Koufopantelis*, the fall of 1959, might not have existed on September 26, 1960, when subpoenas for examination of the third parties were served in the present proceeding. They point out that on April 1, 1960, a super-

sedeas bond was posted in the *Koufopantelis* case, removing all restraint from further transfers. But the contentions of the ship-owning third parties are mere speculation. They have shown nothing to indicate that their prior indebtedness does not continue to exist. Section 794 requires them to produce facts, not to indulge in speculations, to support their theory that they are not indebted to the defendant.[3]

As the court below stated:

> The plain fact remains that on January 1, 1959, the judgment debtor had an ocean-going vessel; that on January 4, 1959, it had over $800,000 in cash; that in April and June of 1959, the judgments involved here were entered against the debtor; that until July 23, it was credited with $1,800,000 on Cargo & Tankship's books; and that on July 24, 1959, it had neither vessel, cash, nor credit.

Since the ship-owning third parties presented no evidence to the contrary, the court below was correct in concluding that they were then indebted to Cia. de Nav. San George, S.A. We, therefore, affirm the order of the district court as to these third parties.

Turning to the appeal of Cargo & Tankship Management Corp., we believe reversal is required as to that party. In *Koufopantelis* this court unanimously decided that the relationship of Cargo & Tankship to the funds once in its

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3. Section 794(2) states:
> "If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial * * *" (See footnote 1).

hands in the account it kept in the name of the judgment debtor could not be determined summarily under section 794. We follow our prior holding and reverse the order below as to Cargo & Tankship.

Order affirmed in part and reversed in part.

Orders Of

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June, one thousand nine hundred and sixty-two.

Present—HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL, Circuit Judges.

PANORIOS PANTELOGLOU,
Judgment Creditor-Appellee,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,
Third Party Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to appellants Santa Maria Shipowning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A., and Panathena Trading & Shipowning Company be and it hereby is affirmed; with costs to the appellees.

Further ordered, adjudged and decreed that the order of said District Court as to the appellant Cargo & Tankship Management Company be and it hereby is reversed; with costs to the said appellant.

A. Daniel Fusaro,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June, one thousand nine hundred and sixty-two.

Present—HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL, Circuit Judges.

DIAMANTIS DRAKOPOULOS, *et al.*,
Judgment Creditors Appellees,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,
Third-Party Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to appellants Santa Maria Shipowning & Trading Company, S.A., Cia de Navegacion San Martine, S.A., and Panathena Trading & Shipowning Company be and it hereby is affirmed; with costs to the appellees.

Further ordered, adjudged and decreed that the order of said District Court as to the appellant Cargo & Tankship Management Company be and it hereby is reversed; with costs to the said appellant.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June, one thousand nine hundred and sixty-two.

Present—HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL, Circuit Judges.

SPIRIDON BARDIS,
Judgment Creditor-Appellee,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,
Third Party Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to appellants Santa Maria Shipowning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A., and Panathena Trading & Shipowning Company be and it hereby is affirmed; with costs to the appellees.

Further ordered, adjudged and decreed that the order of said District Court as to the appellant Cargo & Tankship Management Company be and it hereby is reversed; with costs to the said appellant.

A. Daniel Fusaro,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of June, one thousand nine hundred and sixty-two.

Present—HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL, Circuit Judges.

PANORIOS PANTELOGLOU,
Judgment Creditor,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

DIAMANTIS DRAKOPOULOS, *et al.*,
Judgment Creditors,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

SPIRIDON BARDIS,
Judgment Creditor,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor.

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING CO. and CARGO & TANKSHIP MANAGEMENT CORP.

Third Party Appellants.

A petition for a rehearing having been filed herein by counsel for the third party appellants, Santa Maria Ship-

owning & Trading Company, S.A., Cia. de Navegacion San Martine, S.A., and Panathena Trading & Shipowning Company,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

Constitution of The United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 781 of the Civil Practice Act of the State of New York

§781. Transfer of property by judgment debtor or third party enjoined. Upon the service of the subpoena upon the judgment debtor or any third party who has in his or its possession property or moneys belonging to the judgment debtor or who is indebted to the judgment debtor, such judgment debtor or third party is hereby forbidden to make or suffer any transfer or other disposition of, or to interfere with, any property belonging to the judgment debtor or to which he may be entitled or which may thereafter be acquired by or become due to said judgment debtor, or to pay over or otherwise dispose of any moneys due or to become due to such judgment debtor, not exempt by law from application to the satisfaction of the judgment, until the further order of the court except that such third party shall not be obliged to withhold the payment of any moneys beyond double the amount claimed in such subpoena by the judgment creditor.

Any person served with said subpoena, who shall violate the provisions of such restraining provision, shall be subject to punishment by the court by fine and imprisonment or either, as and for a contempt. To effect such restraining provision, a copy of this section must be indorsed upon the copy of the subpoena served under this article.

The restraining effect of a subpoena served upon a third party shall not, however, apply to any property, money or indebtedness which appears from the books or records of the third party to belong to or to be due to a person or corporation other than the judgment debtor.

unless the third party has knowledge or reason to believe that such property, money or indebtedness belongs to or is due to the judgment debtor; but the court may by order at any stage of the proceeding grant a restraining provision applicable to any such property, money or indebtedness, which is specified in the order, where it is shown to the court's satisfaction by affidavit or other written proof that there is reason to believe that such property, money or indebtedness belongs to or is due to the judgment debtor.

Unless previously vacated by order of the court or by stipulation of the parties, a restraining provision as herein provided shall remain in full force and effect for a period of two years from the date of the service of the subpoena, at which time it shall be deemed vacated for all purposes unless extended by order of the court for good cause shown.

Section 794 of the Civil Practice Act of the State of New York

§794. Order permitting or directing person indebted to pay debt to sheriff or judgment creditor.

1. At any time after the commencement of a special proceeding authorized by this article, the court, upon proof by affidavit to its satisfaction that a person or corporation is indebted to the judgment debtor, whether such indebtedness is matured or unmatured, and upon such a notice given to such persons as it deems just, or without notice, may make an order, permitting the person or corporation to pay a sheriff designated in the order a sum on account of the alleged indebtedness, not exceeding the sum which will satisfy the judgment or execution, or to pay to the judgment creditor a sum on account of the alleged indebtedness not exceeding the judgment with interest, unless a receiver has been appointed or a receivership has been extended to the special proceeding, and in that case to the receiver.

2. At any time after the commencement of a special proceeding authorized by this article, the judgment creditor may by notice of motion served either personally or as the court may direct, upon the judgment debtor and such third party as described in the preceding subdivision of this section, apply to the court for an order directing the said third party to pay to the judgment creditor, unless a receiver has been appointed or a receivership has been extended to the special proceeding and in that case to the receiver, a sum on account of the alleged indebtedness not exceeding the judgment with interest. If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the

court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial of the issues in an action brought by the judgment creditor or a receiver of the judgment debtor or any claimant to said indebtedness. If the indebtedness is unmatured, the order shall direct that payment be made on the date when the indebtedness shall mature. Disobedience of an order granted pursuant to this subdivision may not be punished as a contempt, but the said order may, at any time after five days from the entry thereof, be docketed as a judgment and shall be enforceable as such, except that if the order directs that payment be made on a future date, it shall not be docketed as a judgment until after five days from such future date.

3. A payment thus made under either an order permitting such payment or directing it, is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor in good faith and for a valuable consideration of whose rights the third party had actual or constructive notice prior to the entry of the order.

Section 795 of the Civil Practice Act of the State of New York

§795. Action by judgment creditor against third party. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment debtor, the court may make an order authorizing the judgment creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements and expenses allowed by the court. Such action by a judgment creditor against the debtor of the judgment debtor shall make the judgment debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment creditor and against the debtor of the judgment debtor, and the debtor of the judgment debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment debtor.

Section 800 of the Civil Practice Act of the State of New York

§800. Proceedings by third person to vacate stay. Any person restrained by any stay or injunction under this article from transferring or disposing of any property or paying any moneys or indebtedness, may vacate such stay by giving an undertaking to pay the judgment and costs of the proceeding if the judgment creditor or the receiver be successful in said proceeding against said third person; or upon such notice to the judgment creditor as the court specify, may apply to the court to give an undertaking, conditioned as above, in the sum equal to the value of the property or moneys to be released from restraint, or on such other conditions, as the court may prescribe and upon furnishing such undertaking or complying with such conditions, such stay shall be vacated.

Rule 69(a), Federal Rules of Civil Procedure

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 346

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,

Petitioners,

—vs.—

FANORIOS PANTELOGLOU, *et al.*,

Respondents.

RESPONDENTS' OPPOSING BRIEF

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September 14, 1962

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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IN THE

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SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,

Petitioners,

—VS.—

FANORIOS PANTELOGLOU, *et al.*,

Respondents.

RESPONDENTS' OPPOSING BRIEF

Statement

The petition herein seeks the review of a decision of the Second Circuit dated June 6, 1962 (1a) and reported as *Panteloglou, et al.* v. *Cia de Nav. San George, S.A., et al.*, 303 F. 2d 641.

Said decision affirmed the holding of District Judge Lloyd F. MacMahon (7a-12a, record below) dated March 20, 1961 (not June 13, 1961 as stated at 7a, record below) that these petitioners had fraudulently despoiled the corporate debtor, CIA DE NAV. SAN GEORGE, S.A., of all of its assets, at a time when the latter was already indebted to respondents. Pursuant to Section 794 of the New York Civil Practice Act (18a) petitioners were directed to pay

over to respondents sufficient of such assets to satisfy the latter's judgments against the said debtor.

Discovery of the petitioners' looting of the debtors' property was made for the most part through extensive examinations of the books of account of Cargo & Tank Ship Management Co., petitioners' ships' agent and no contention is made herein by petitioners that they did not so receive the debtor's property. As a matter of fact, this evidence was before this Court in a similar case, *Cia de Nav. San George, S.A.* v. *Koufoupantelis, et al.*, 368 U. S. 895 (1961) when the same petitioners unsuccessfully sought review of a similar order obtained by other respondents upon the same evidence.

In this earlier case, as here, there was no claim that petitioners had not divested the debtor of $1,800,000.00 without consideration therefor and at a time when the debtor was indebted to respondents.

In the instant case, petitioners similarly do not deny that all of the debtor's assets were so rifled by them, but attempt to find a basis for certiorari other than that rejected in *Koufoupantelis, supra*, by raising an alleged violation of the due process provisions of the Fifth Amendment. This purported invasion of the petitioners' rights is claimed to arise from the fact that respondents have relied on the same evidence presented in *Koufoupantelis* and have failed to establish anew the self-same facts developed by the examinations and testimony in *Koufoupantelis*.

Thus, petitioners contend that it was improper for the Court below to affirm the District Court's judgment without requiring respondents to prove all over again that

the same $1,800,000.00 had been fraudulently transferred from the debtor to petitioners and that the same had not been repaid by petitioners. It is noteworthy in this regard that not an iota of proof was proffered by petitioners, either in the District Court, the Court of Appeals or in their petition herein, in support of this contention.

All that appears is the naked affirmation that six months elapsed between the filing of the supersedeas bond in the *Koufoupantelis* appeal and the date supplementary proceedings were instituted by respondents against petitioners in the instant case. Petitioners' position is that during this period of approximately six months (petition p. 7) they "were relieved of all restraints with respect to any moneys of the judgment debtor which might have been under their control . . . ." However, there is no claim made, as indeed there could not properly be, that petitioners were relieved of the obligation to repay the funds which they had improperly taken from the judgment debtor. Supersedeas bonds are effective to stay execution upon judgments appealed from, but they do not cancel or satisfy any outstanding obligations merely by reason of their being filed. Nor, did such bond affect the obligation of petitioners to these respondents where such bond was filed in the *Koufoupantelis* case.

In the *Koufoupantelis* appeal at p. 714 of 291 Fed. 2d, the Court of Appeals stated of these same petitioners:

> "As the third parties have failed to make any explanation of the facts alleged by the plaintiffs we treated those facts as if they were true."

So too, here, a concise statement of the petitioners' failure to meet their burden of proof throughout appears in

the opinion of Judge MacMahon in the District Court (p. 10a, record below):

> "The third parties have not shown, and indeed do not even claim, that the judgment debtor received any consideration whatever for the transfers to them. Rather, they vaguely explain the July 24 transfer as an 'auditor's adjustment' necessitated by a balancing of mutual accounts maintained by Cargo & Tankship for the 'Santa' group of vessels.
>
> * * * * *
>
> "[11a] A mere recitation of the facts garnered from Cargo & Tankship's records impels the conclusion that the transfer to the third parties was fraudulent."

Again, the Court of Appeals in its opinion herein stated (7a):

> "They [petitioners] have shown nothing to indicate that their prior indebtedness does not continue to exist. Section 794 requires them to produce facts, not to indulge in speculations, to support their theory that they are not indebted to the defendant."

As the Court below stated:

> "The plain fact remains that on January 1st, 1959, the judgment debtor had an ocean-going vessel; that on January 4th, 1959, it had over $800,000.00 in cash; that in April and June of 1959, the judgments involved here were entered against the debtor; that until July 23, it was credited with $1,800,000.00 on Cargo & Tankship's books; and that on July 24, 1959, it had neither vessel, cash, nor credit.
>
> Since the ship-owning third parties presented no evidence to the contrary, the court below was cor-

rect in concluding that they were indebted to Cia De Nav. San George, S.A."

It is clear the petitioners failed to meet their obligation under said Section 794 to "show such facts as may be deemed by the Court sufficient to entitle the said * * * third party to a trial of the issues * * *". Such failure or inability to come forward with evidentiary facts further sustained the decisions of the Courts below. The alleged violation of the Fifth Amendment is without substance and merely intended to delay the enforcement of respondents' rights.

No Federal or Other Question Worthy of Review Appears Herein

With respect to the merits of the instant petition, it may be noted that the identical evidence herein has been passed upon by District Judge Palmieri (Docket No. 335, October Term, 1961, pp. 1a-5a) in *Kaufoupantelis*, as well as by the Court of Appeals in the latter case, 291 F. 2d 709; by District Judge McMahon (7a-12a record below) in the present case and the decision below (1a-8a), 303 F. 2d 641.

In each of these instances, the Court found that the creditors had proved facts sufficient to meet the requirements of said Section 794 (18a) but that these same petitioners had failed to " . . . show such facts as may be deemed by the Court sufficient to entitle the said judgment debtor or a third-party to a trial of the issues" in a plenary action.

Making no claim, even hereon, that there is evidence extant contravening the facts found by all the other Courts, and the petition herein expressly stating (p. 7) that a "factual question . . . was resolved . . ." by the District Court, petitioners now allege that the evidence herein was

defective for the simple reason that it was the identical proof proffered in *Koufoupantelis* rather than the same facts established anew in the instant case (p. 7).

This argument, at best, relates to a trivial question of evidence and certainly does not attain to the dignity of a federal question or a constitutional violation worthy of review.

While the label of unconstitutionality is pinned by petitioners to the Courts' action below because the factual question was decided adversely to petitioners, no claim is presented that the New York statute itself is unconstitutional. Petitioners rather argue that the Court below erroneously indulged in a so-called presumption of continuance (p. 8) " . . . to the effect that a state of facts shown to exist in the fall of 1959 must necessarily also have existed on September 26, 1960, in the absence of proof to the contrary".

Indulgence in such a formal presumption is not reflected in either the opinions of Judge McMahon or of the Court of Appeals. This charge, if true, is at worst merely one that the Court pursued ordinary logic in finding that a fact proven to exist yesterday will be believed to exist today in the absence of proof to the contrary.

Lest there be a mistaken interpretation gathered from the petition relative to this argument that the determination below "rested solely upon evidence which had grown stale with the passage of time . . ." (p. 9), it should be noted that petitioners do not contend that the proofs and evidence were not assembled in new affidavits and exhibits in the within case and presented to Judge McMahon in open Court on November 22, 1960 (p. 3a record below, reciting

the moving papers). Petitioners' argument rests solely on the claim that the facts proven in *Koufoupantelis* were also presented to the Court below.

There is no legal substantiation in the petition by cited precedents, or otherwise, that in the absence of repayment or replacement the debtor's assets taken on July 24, 1959 (7a) (and still admitted to be withheld on April 1st, 1960 [p. 7]), did not continue to be withheld on November 22nd, 1960, when the original motion was argued before Judge MacMahon (p. 3a record below).

Nor is it material hereon whether or not the Courts below relied on a legal presumption in concluding that petitioners were liable under the provisions of said Section 794. The authorities which are cited by petitioners at p. 8 of the petition do not establish error, but, in fact, support the findings below. They merely emphasize the propriety of the findings that petitioners did not or could not produce evidentiary material to meet their burden within the framework of Section 794.

Petitioners cite *N. L. R. B.* v. *Piqua Munising Wood Products Company*, 109 F. 2d 552, 554, for the alleged authority that an indulgence in such presumption was erroneous and presume to quote from that decision. However, the mere perusal of the quoted portion in full indicates that the Court *held there that the question of continuation* of membership in a union was one of fact and was to be "decided upon *in the light of the facts and circumstances* before" the Board (Italics ours).

The full sentence quoted only in part by petitioners reads: "It is a well-established rule of evidence that when the existence of a personal relationship or state of things, is

once established by *proof*, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter". (italics ours)

Here, too, the rule is clearly stated to require that "the contrary is shown" by petitioners' adducing *facts*, not speculative conclusions, to support their arguments.

So, also, in *Isthmian Steamship & Co.* v. *California Spray-Chemical Corp.*, 300 F. 2d 41, 49 (C. A. 9, 1962), the Court recently treated with a similar argument. The Court stated:

> "Since the shipper was originally the owner of the cargo and *since nothing was put in evidence to change that fact* it could be assumed (in fact we must assume)—in support of the judgment—that the shipper was still the owner of the cargo. Appellant had not proved otherwise, and it certainly had not established any ground for invoking § 1739 (4) in support of its position". (Italics ours).

In this latter case, the Court assumed in 1962 that ownership proved as of 1952 remained the same, absent other proof. Also, in the latter situation supersedeas bonds had been posted pending determination of the appeal but, of course, the same could not and did not affect in any way the question before the Court. Nor did the passage of time render the evidence "stale".

It is further contended by petitioners that the supersedeas bond posted in *Koufoupantelis* effected some kind of mysterious hiatus in the obligation of petitioners to replace or repay the assets of which they stripped the judgment debtor. This is somehow related by petitioners to the supplementary proceedings instituted *sub judice* and is

claimed by them to have obviated the need for these petitioners to repay their debt to the judgment debtor. Obviously, while the *Koufoupantelis* subpoenas created a stay restraining the third-party petitioners from disposing of the debtor's assets in that case, and while the supersedeas bond in *Koufoupantelis* stayed the execution by the judgment creditors of their judgments against petitioners therein, neither constituted a satisfaction of such indebtedness. As a matter of fact, even when the *Koufoupantelis* judgment was paid in 1961 after certiorari was denied by this Court, the petitioners' obligation to the judgment debtor was satisfied only to the extent of such payment, and the balance of more than $1,000,000. was, and still is, due to the debtor from these same petitioners. Certainly, no supersedeas bond has affected or modified in any way, this remaining obligation.

Clearly, if petitioners' argument that no indebtedness existed, by reason of their misappropriation of the debtor's assets, after the supersedeas bond had been posted in *Koufoupantelis* were valid, there would have been no reason for the payment by petitioners of the judgments obtained in the *Koufoupantelis* cases based upon the existence of petitioners' obligations to said debtor.

On p. 11 of the petition it is claimed that there is a "lack of pertinent evidence before the Court" which "established the existence of an issue of fact".

There is no attempt there, or anywhere else in the petition or in the record below to show or prove such alleged paucity of evidence. Obviously, if such lack existed it would appear from the moving papers, affidavits and exhibits presented to Judge MacMahon by the respondents.

The order entered by Judge MacMahon upon such motion (p. 3a record below) recites these affidavits and exhibits and both the opinions below discuss at length the evidence adduced by respondents, but petitioners have not even troubled to print for the Court or to submit the aforesaid supporting papers.

CONCLUSION

There has been no showing made by petitioners of any error whatsoever herein, no basis for an alleged review grounded upon any violation of the Fifth Amendment or any reason in this case for an interpretation of the scope of the Court's authority under Section 794 of the New York Civil Practice Act. It is therefore respectfully prayed that the petition for a writ of certiorari be denied in all respects.

Respectfully Submitted,

EDWARD B. JOACHIM
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Counsel for Respondents

HERBERT LEBOVICI
HAROLD D. SAFIR
Of Counsel

September 14, 1962